

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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JULIO PERREIRA, :

Petitioner, :

-against- : No. 3:02CV0769 (GLG)
: **MEMORANDUM DECISION**
STEVEN J. FARAQUHARSON, :
District Director, INS :
Northeast District, and :
PHIL STANLEY, Corrections :
Commissioner, State of :
New Hampshire Department of :
Corrections, :

Respondents. :
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Petitioner Julio Perreira, proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, seeking his release from the custody of the Immigration and Naturalization Service ("INS") and the Department of Corrections ("DOC"), "wherever it may be located in the United States." Petitioner also asks for a stay of his deportation so that he can seek a transfer to the State of Texas, where his family is located, and to permit him to obtain an adjustment of his immigration status.

Background

Petitioner, a citizen of El Salvador, had entered the United States illegally in 1979 and was immediately ordered removed from the United States. He subsequently re-entered the United States

at an unknown date and location.¹

On August 16, 2000, Petitioner was convicted of criminal impersonation and resisting arrest in violation of Conn. Gen. Stat. §§ 53a-130 and 53a-167a and was sentenced to concurrent terms of six months imprisonment. (State of Connecticut Judgment dtd. 8/16/00).

On October 13, 2000, the INS in Hartford, Connecticut, instituted removal proceedings against Petitioner based upon his second illegal entry into the United States. (Notice to Appear dtd. 10/18/00). On November 8, 2000, upon the completion of his state-court sentences, Petitioner was turned over to the custody of the INS and was detained without bond.² (Tr. dtd. 11/9/01 at 21-22). The INS then held removal hearings at which Petitioner, who is Spanish-speaking³ and who appeared pro se,⁴ testified with the assistance of a secretarial employee of INS, who acted as his interpreter. (Tr. dtd. 11/9/01 at 9, 13-14). The Immigration Judge denied Petitioner's request for political asylum, as well

¹ Petitioner testified that he has been living in the United States continuously since 1982. He married an American citizen in 1984 and began the naturalization process, but when they separated after a year, he no longer pursued this. (Tr. dtd. 11/9/01 at 4-5).

² Petitioner was initially held by INS in Connecticut and then transferred to the New Hampshire State Prison. He was later transferred back to Connecticut.

³ See Discussion at 5-6, infra.

⁴ Petitioner requested a court-appointed attorney, but his request was denied.

as his application for withholding under the Convention Against Torture, and, on January 5, 2001, ordered him removed to El Salvador. (Order of the Immigration Judge dtd. 1/5/01). Petitioner reserved his right to appeal this Order, but an appeal was never filed.⁵ Accordingly, the Order of the Immigration Judge became a final order thirty days later. See 8 C.F.R. §§ 3.39, 240.14

On February 22, 2001, the INS applied for travel documents for Petitioner from the El Salvadorian Consulate. The application was approved, but the travel documents expired on December 7, 2001. (Tr. dtd. 11/9/01 at 25). A second application for travel documents was approved on May 13, 2002, but these likewise expired on June 12, 2002.

Proceedings on the Petition for Writ of Habeas Corpus

In the interim, on April 26, 2001, Petitioner filed the instant petition for habeas corpus relief in the District of New Hampshire, where he was confined at the time. The primary thrust of his petition was that he had been held by the INS for more than 90 days without having been removed to El Salvador in violation of 8 U.S.C. § 1231(a)(1)(A).⁶ He also challenged the

⁵ Petitioner states that he did not file an appeal because he was under the impression that the deportation order would be executed within three to seven days. (Petition ¶ B).

⁶ Section 1231(a)(1)(A) provides:

Except as otherwise provided in this section,
when an alien is ordered removed, the

conditions of his confinement⁷ and the failure of DOC to provide him with meaningful access to a "comprehensive immigration detainee legal support system." (Petition at ¶ 5). The Magistrate Judge initially reviewed the petition and recommended that Petitioner's claim regarding the denial of court-appointed counsel and his claim challenging the conditions of his confinement be dismissed. The Magistrate recommended that his claims regarding the excessive length of his detention and denial of interpreter services⁸ proceed, and further recommended that a

Attorney General shall remove the alien from the United States within a period of 90 days.

. . .

Subsection (B) provides that the removal period begins on the date the order of removal becomes administratively final.

⁷ Specifically, he objected to the day-to-day living conditions, the "excessive lock-ins" that limit the amount of time he was permitted to spend out of his cell, the "enforced idleness" caused by a lack of outdoor recreation time and other amenities, the unavailability of reading materials, particularly in Spanish, the "intake and classification" procedures that fail to differentiate between criminal convicts and immigration detainees, "double celling" inmates in a cell intended for one person, the lack of an on-site immigration officer, attorney, or interpreter, and the absence of immigration-related legal materials.

⁸ As discussed more fully below, the Magistrate Judge interpreted the petition as including a claim by Petitioner that he was denied an interpreter during his immigration hearings. The petition states at paragraph 7:

The nature and extent of the conditions of confinement described (but not limited thereto) coupled with the absence of the immigration detainee legal support system (also not limited thereto), Greatly [sic] undermine the petitioner's [sic] right to

hearing be conducted on the request for a stay of deportation. The District Judge approved the Magistrate's recommended ruling and scheduled a hearing on Petitioner's request for a stay. On November 9, 2001, a hearing was held before the Magistrate Judge, at which Petitioner testified with the assistance of an interpreter. During the hearing, the Magistrate Judge inquired of Petitioner:

THE COURT: And when you had your immigration hearings, your complaint says that you were denied an interpreter. Is that true?

MR. PERREIRA: Well, I had a secretary who works there, who works in taking down the information for people coming in. But I did not understand her very well. Her Spanish was not very clear, like the way we speak. So I was unable to understand very clearly what was going on, because I went without an attorney. . . .

(Tr. dtd. 11/9/01 at 9). Petitioner testified that he had appeared before the Immigration Judge three times. Each time he

due process of law in relation to the immigration deportation proceedings in which he is the pro se respondent.

Later in his petition, he complains that due to his limited mastery of the English language, communicating with INS personnel, as well as DOC officials, has been a

daunting task. It is fair to presume that there have been some miscommunications along the line. It is also fair to assume that such miscommunication and misunderstanding will continue unless Interpreter [sic] Services are provided by U.S.I.N.S. and DOC.

(Petition at § II). This is the only reference to a lack of interpreter services anywhere in the petition.

appeared, he was allowed to speak but, he stated, "my English is so poor. I can understand a lot, but my English is very poor speaking."⁹ Id. at 13.

When questioned by the Government attorney as to whether there was anyone in the courtroom who spoke Spanish, Petitioner responded:

A real interpreter, a court interpreter, no, there was not one present. There was someone who worked in the office. But she would always be busy doing her work and trying to assist me and then doing her work. I don't think she was really aware of what I was trying to tell the judge, because she was busy with her own job. I would have liked someone like you who's listening to what I'm saying and interpreting that, what I'm saying. Because when I would say something, she would ask me what does that mean and what does that other thing mean, because she didn't really understand exactly what I was saying. And then she would speak in English to him, and I don't really think she was saying to him exactly what I was saying. I'm saying that because I understand English. And I feel that she did not do a good job with me because of her job, because of her work, I think. . . .

An interpreter should be someone who speaks Spanish well and speaks English well, to be able to understand what someone is saying. And I think that when the judge made his decision there, I really did not have a right to - I did not - I was not able to defend myself.

Id. at 13-14.

⁹ We note that Petitioner has resided in the United States for 20 years. He states in his petition that he is not proficient enough in English "to tackle mainstream literature." (Petition at ¶ IV).

Q: Did you say anything to the judge about an interpreter?

A: I told him that I really was not able to communicate very well through her. But he didn't seem to pay much attention to that. He continued speaking in English.

Id. at 15.

Following the hearing, on November 13, 2001, the Magistrate Judge recommended that a stay of deportation be granted. In reaching this conclusion, he opined that Petitioner would suffer irreparable harm if removed and that he had a "substantial possibility of success on appeal regarding a due process claim in being denied the right to interpreter services throughout the course of administrative proceedings." (Report and Recommendation dtd. 11/13/01). By order dated November 14, 2001, District Judge DiClerico provisionally approved the Magistrate's recommendation pending receipt of any objections and issued a stay of removal "[i]n view of the fact that deportation may be imminent." (Order dtd. 11/14/01).

The Government then objected to the Magistrate's recommended ruling and moved to dismiss the habeas petition and vacate the stay. By summary order dated December 12, 2001, the District Judge approved the Magistrate's Report and Recommendation.

On March 22, 2002, the District Judge dismissed Respondent Stanley, the Commissioner of the New Hampshire Department of Corrections, since Petitioner had been moved back to Connecticut and Respondent Stanley was no longer the custodian of Petitioner.

He further directed the Government to address the issue of the proper respondent.

The Government then requested that this case be transferred to the District of Massachusetts, on the ground that the INS District Office in Boston supervises the INS in Hartford, the location of Petitioner's removal proceeding and his current detention. The Court denied the Government's requested transfer to Massachusetts and ordered instead that the action be transferred to Connecticut, which he noted would be the more appropriate forum to address the question of the proper respondent. (Order dtd. 4/30/02).

On June 12, 2002, the Government filed its response to the petition for writ of habeas corpus. The Government now concedes that the District of Connecticut is the appropriate forum to litigate this matter and that Steven Farquharson, the INS District Director for Connecticut, Massachusetts, New Hampshire, and Rhode Island is the appropriate respondent in this case. Therefore, we need not address this matter any further.

Discussion

Turning to the merits of Petitioner's habeas petition, the Government argues that Petitioner never alleged in his petition that he was denied an interpreter at the immigration hearings. Rather, Petitioner alleged only that one of the "conditions of confinement" that warrants his release from custody was the lack

of interpreter services at the New Hampshire State Prison to facilitate his ability to communicate with INS and prison officials. See Note 8, infra. Additionally, the Government asserts that Petitioner has failed to establish a due process violation in that he has presented no evidence that he needed an interpreter or that he requested and was denied an interpreter during his removal hearings. Further, Petitioner failed to exhaust administrative remedies during the removal hearings.

With respect to Petitioner's continued detention, the Government maintains that there has been no due process violation in that the delay in his removal was caused by Petitioner's filing of this habeas petition, not anything done by the INS. Moreover, the habeas petition was filed prior to the expiration of the 90-day removal period. Finally, the Government argues that, if the stay is lifted, there is a significant likelihood that Petitioner will be removed in the near future, as evidenced by the fact that the INS has twice obtained travel documents from El Salvador.

The Qualifications of the Interpreter in the Removal Proceedings

We agree with the Government that Petitioner never raised in his petition the claim that his due process rights were violated by virtue of the INS's failure to provide him with a more qualified interpreter at his removal hearings. Rather, his complaints about a lack of an interpreter relate to his detention

after the removal order was issued, and his inability to communicate with INS and DOC officials. The issue of the interpreter's qualifications at his removal hearing was raised for the first time by the Magistrate Judge sua sponte during the hearings on Petitioner's motion to stay. Nevertheless, this has become an issue in this case and will be addressed herein.

Because this matter comes before us on a petition for habeas corpus under § 2241, we have jurisdiction only to consider whether Petitioner's custody is in violation of the Constitution or laws of the United States. Zadvydas v. Davis, 533 U.S. 678, 686 (2001); Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998), cert. denied sub nom Navas v. Reno, 526 U.S. 1004 (1999). As the Second Circuit stated in Henderson, not "every statutory claim that an alien might raise is cognizable on habeas. But those affecting the substantial rights of aliens . . . surely are." Id. The Second Circuit has held that the "very essence of due process" is a meaningful opportunity to be heard, which includes the right to translation services sufficient to enable the alien and judge to be understood. Augustin v. Sava, 735 F.2d 32, 37-8 (2d Cir. 1984)(internal citations and quotations omitted).

The Government contends, however, that this claim must be dismissed due to Petitioner's failure to exhaust administrative remedies. With regard to immigration laws, exhaustion of remedies is statutorily required only for appeals of final orders of removal. See 8 U.S.C. § 1252(d)(1); Hoang v. Comfort, 282

F.3d 1247, 1254 (10th Cir. 2002). This is not such an appeal. Although exhaustion is not mandated by statute, the Supreme Court in McCarthy v. Madigan, 503 U.S. 140, 145 (1992), held that courts may, in their discretion, require exhaustion of administrative remedies. There are, however, "at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion": 1) where requiring resort to an administrative remedy may cause undue prejudice to the assertion of a subsequent court action, as where the time period required for administrative action is unreasonable or indefinite; 2) where the administrative remedy is inadequate because of doubt as to whether the agency is empowered to grant relief; and 3) where the administrative remedy is inadequate because the administrative body is biased or has otherwise predetermined the issue before it. Id. at 146-149; see also Henderson, 157 F.3d at 122, n.15 (stating that § 2241 habeas relief is constitutionally required only where the immigration laws have been interpreted to bar other forms of judicial review). None of these circumstances applies here.

With respect to Petitioner's claim that he was denied an effective interpreter during the removal hearings, this claim should have been raised in an appeal to the Board of Immigration Appeals ("BIA"), where this alleged procedural irregularity could have been corrected. See Vargas v. INS, 831 F.2d 906, 908 (9th

Cir. 1987). Although the BIA does not have jurisdiction to adjudicate constitutional issues, it does have the authority to correct procedural errors. See Id.; Delbois v. Johnson, No. 95-CV-963H, 1996 WL 622646, at *2 (W.D.N.Y. Sept. 19, 1996)(holding that in order to raise unexhausted claims in a petition for review of a deportation order, the petitioner must show that the due process challenge does not involve a procedural error which the BIA could correct). Here, Petitioner wholly failed to avail himself of his right to appeal the Immigration Judge's Order. The alleged failure to provide him with an effective interpreter could have been raised in that appeal and addressed by the BIA, which could have ordered a rehearing if necessary. See Granados v. Ashcroft, 21 Fed. Appx. 628, 2001 WL 1230896 (9th Cir. 2001)(unpublished decision).

Moreover, even if we were to consider the merits of this claim, Petitioner has failed to offer any evidence as to anything he did not understand, during the removal proceedings, because of an inaccurate translation by the interpreter, or as to any testimony that was incorrectly translated for the Immigration Judge. Indeed, Petitioner admits that he understands the English language well, and, thus, he should have been able to comprehend what was being said during the proceedings. Additionally, Petitioner has failed to produce any evidence that he was prejudiced in any way by the allegedly inadequate translation. See Perez-Lastor v. INS, 208 F.3d 773, 778 (9th Cir. 2000);

Barrientos v. INS, 32 Fed. Appx. 837, 2002 WL 460940 (9th Cir. 2002)(unpublished decision).

Thus, we hold that there is no evidence to support a finding that Petitioner was denied procedural due process at his removal hearings because of an incompetent interpreter.

Petitioner's Continued Detention Beyond the 90-Day Period

The other remaining claim relates to Petitioner's detention beyond the 90-day removal period, 8 U.S.C. § 1231(a)(1)(A), and beyond what the Supreme Court deemed presumptively reasonable in Zadvydas.

There are several problems with Petitioner's claim in this regard. First, at the time Petitioner filed his petition for habeas corpus relief, the 90-day removal period, which commences once the removal order becomes final, had not expired. Because Petitioner reserved his right to appeal the order of the Immigration Judge, the removal order did not become final until 30 days thereafter, on February 5, 2001. The 90-day removal period would have expired on May 6, 2001. However, on April 26, 2001, Petitioner filed the instant habeas petition. The INS had already commenced efforts to obtain travel documents from El Salvador, but before these were obtained, the District Court in New Hampshire entered an order staying the deportation of Petitioner. (Order dtd. 11/14/01). Thus, it was the filing of the petition and the request for a stay, rather than any acts on

the part of the INS, that delayed Petitioner's removal. In fact, the INS has applied for and twice received travel documents from El Salvador.

Additionally, to the extent that Petitioner relies on Zadvydas, that reliance is misplaced. In Zadvydas, the Supreme Court considered the question of "whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States." Zadvydas, 533 U.S. at 695. The instant case does not present a situation where the INS is unable to remove an alien. Twice El Salvador issued travel documents for Petitioner's return to El Salvador.

Petitioner had failed to produce any facts indicating that the INS is incapable of executing his removal to El Salvador and that his detention will be of an indefinite duration. See Akinwale v. Ashcroft, 287 F.3d 1050, 1051 (11th Cir. 2002). There is nothing to indicate that once the stay is lifted, Petitioner will not be expeditiously removed from the United States to El Salvador. Accordingly, we find no violation of Petitioner's constitutional rights with respect to his continued detention.

Conclusion

For the foregoing reasons, the Petition for Writ of Habeas Corpus is in all respects DENIED. The Stay of the removal

proceedings previously entered by the District Court for the District of New Hampshire is LIFTED. The Clerk shall enter Judgment accordingly.

SO ORDERED.

Date: August 15, 2002.
Waterbury, Connecticut.

_____/s/_____
GERARD L. GOETTEL,
United States District Judge